



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 4427/05

In the matter between:

LINDIMPI WILSON NTSHANGASE
 MELLINAH NTSHANGASE (BORN
 NKWANYANA)
 JUMAIMA NTSHANGASE
 LAZARUS JABULANI MASUKU

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

4TH APPLICANT

And

HIS ROYAL HIGHNESS PRINCE
 TFOHLONGWANE N.O.
 HIS ROYAL HIGHNESS PRINCE
 KHUZULWANDLE N.O.
 THE HONOURABLE JIM GAMA N.O.

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

<u>CORAM</u>	:	Q.M. MABUZA -J
FOR THE APPLICANTS	:	MR. M. MABILA
FOR THE RESPONDENTS	:	MR. J. MAGAGULA

JUDGMENT 16/8/07

[1] The Applicants herein seek an order in the following terms:

(a) Declaring that the late Muzikayise Andreas Ntshangase be buried at Mkhwakhweni Area in the District of Shiselweni.

(b) Costs in the event application is opposed.

(c) Further and/or alternative relief.

[2] The background to this matter is set out in the founding affidavit of the 1st Applicant, Lindimpi Ntshangase. The 1st Applicant's father Muzikayise Ntshangase died on the 22nd of December 2002 and he has not been buried. His body lies at one of the local morgues, Mbabane Burial Society. It has lain there since December 2002. This is because of a dispute between the parties to these proceedings concerning where he should be buried. The second and third Applicants are the widows of the deceased, who in terms of Swazi Custom are adhering to tradition which dictates that they remain in doors until the deceased is buried. The

fourth Applicant is the Indvuna of Mkhwakhweni area in the Shiselweni region where the Applicants seek to bury the deceased.

- [3] The family duly reported the death to the authorities at Ludzidzini Royal Residence in particular to the 3rd Respondent Governor Jim Gama as the deceased was a member of the Border Restoration Committee which is headed by the 2nd Respondent, Prince Khuzulwandle. Both the 2nd and 3rd Respondents reported the death of the deceased to His Majesty King Mswati III as His Majesty was the one who had appointed the deceased to the Border restoration Committee with special responsibilities.
- [4] His Majesty referred the matter to the Swazi National Standing Committee headed by the 1st Respondent, Prince Tfohlongwane who is its Chairman **to prepare for the burial.** This Committee directed that the deceased should be buried at Mpuluzi area under Chief Nhloko Zwane. This decision was made because it was alleged that the deceased had been evicted from the Mkhwakhweni area.

- [5] The deceased's family and certain residents of this area rejected this contention. They allege that although the eviction order had been issued on the 16th of August 1995 by the Shiselweni Magistrates Court, this order was set aside by way of a default judgment by the High Court. This was followed by a judgment of the Acting Chief Justice confirming the nullity of this order. The judgment of the learned Acting Chief Justice records that it was conceded by the then Attorney General, Phesheya Dlamini that the proceedings pursuant to which an eviction order was granted were irregular.
- [6] Whilst this "eviction" cannot be relied on, the Respondents allege that a prior eviction order had been issued by the Minister for Interior in July 1982. This is disputed by the Applicants in their replying affidavits. I shall return to this aspect of the case later on in my judgment.
- [7] According to the founding affidavit of the 1st Applicant after the matter of the deceased's burial hit a snag during early 2003, His Majesty directed that the matter be referred for deliberation to the Swazi National Council Standing Committee, Ludzidzini Libandla and the Border Restoration Committee, Prince Mfanasibili

and Sigombeni Dlamini.

- [8] It further appears from the Applicants affidavit that when finally these three committees deliberated upon the matter they agreed that the deceased be buried at Mkhwakhweni. They also agreed that two members from each committee including Prince Mfanasibili and Sigombeni Dlamini were selected to report to His Majesty what had been agreed upon. It was further agreed that the 1st Respondent would secure an appointment with His Majesty to enable these selected members to report what had been agreed upon. According to the 1st Applicant the appointment with His Majesty has to date not been secured.
- [9] In his answering affidavit the 3rd Respondent states that the Swazi National Council Standing Committee did not only direct that the deceased be buried at Mpuluzi, it made a recommendation to His Majesty the King who confirmed it.
- [10] He further states in his affidavit that the Applicants not being happy with this decision requested Prince Mfanisibili and Sigombeni Dlamini to act as their

emissary by going to His Majesty the King to “mbula ingubo”. It was thereafter that His Majesty directed the 3 committees including Prince Mfanasibili and Sigombeni Dlamini to deliberate on the matter which they did. This confirms the 1st Applicant in paragraph 7 above.

[11] The 3rd Respondent however denies that the 3 committees agreed that the deceased be buried at Mkhwakhweni. To his knowledge they failed to reach any agreement. The 3rd Respondent has further stated in his affidavit that the 1st Respondent was to secure an appointment with His Majesty the King but this was to report the failure to reach any agreement. He denies that this appointment was to report the decision to bury the deceased at Mkhwakhweni.

[12] The 3rd Respondent is supported by the 1st Respondent with regard to there being a stalemate after the three committees met. He is further supported by the 1st Respondent in that he was to secure an appointment with His Majesty the King in order to report this stalemate. An insightful allegation by the 1st

Respondent at paragraph 6.2 of his answering affidavit reads thus:

“I endeavoured to secure an appointment with His Majesty but I failed to score any success as His Majesty clearly stated that there was nothing he could do with a report of differing opinions as it would not assist him in anyway.”

[13] Another insightful submission is found in paragraph 7 of the 1st Respondent’s answering affidavit namely

“It is indeed the position of the Swazi National Council Standing Committee that the deceased should be buried at Mpuluzi area since that is the recommendation that was made to the king by the Swazi National Council Standing Committee ***and which was confirmed by the King. His Majesty has not yet reviewed that ruling and it therefore still stands.***”

[14] On another note pertinent submissions are made by the 1st Applicant in his replying affidavit in paragraph 11 wherein he states as follows:

11.1 “I am advised by Prince Khuzulwandle, Prince Mfanasibili and Fonono Dvuba that after the committees could not come up with one voice it was decided that the matter be put to vote. I am further advised that there were thirty nine (39) people present and made up from the three committees and the vote in favour of burying the deceased at Mkhwakhweni was thirty one (31) and those who voted against were six (6) and only two (2) people abstained.”

11.2 I am further advised that from the Swazi National Council Standing Committee twelve (12) members voted for the deceased’s burial at Mkhwakhweni and these were:

- a) **Prince Tfohlongwane**
- b) **Prince Maguga (now deceased)**

Prince Masitsela
Prince Mguciso
Senanile Nkosi
Adelaide Dlamini
Peter Mamba
Mlobokazane Fakudze
Magudvulela Dlamini
Reverend Muntu Dlamini
Musa Ndlangamandla
Makhundu Mahlalela

11.3 I am further advised that only six (6) people from the Swazi National Council Standing Committee voted against the deceased’s burial at Mkhwakhweni saying he should be buried at Mpuluzi, and these were;

- a) **Vuka Moi Moi Masilela**

Prince Mahlaba
Ndzamenya Nhlabatsi

Dambuza Lukhele
Samuel Mkhombe
Prince Mbilini

11.4 I am advised that Bheka Mabuza abstained from the vote.

11.5 I am further advised that from the Ludzidzini Committee, save for Jim Gama (deponent to answering affidavit) who abstained, all members voted for the deceased's burial at Mkhwakhweni and these were:

a) ***Abednigo Kuseni Hlophe***

Kaizer Mathanzima Dlamini
Mhlambanyatsi Dlamini
Snothwane Fakudze
Mgcobeya Ndwandwe
Stubutubu Dlamini (now deceased)
Shukela Maziya
Juluka Dvuba
Prince Jahamnyama
Lusendvo Fakudze
Hoppy Dlamini (now deceased)

11.6 From the Border Restoration Committee all members voted that deceased be buried at Mkhwakhweni and these were:

a) ***Prince Khuzulwandle***

Fonono Dvuba
Lazarus Masuku
Martin Mdziniso
M. Ndlangamandla
Jikela Shongwe

11.7 Prince Mfanasibili and Sigombeni Dlamini also voted that deceased be buried at

Mkhwakhweni.

- 11.8 At the end of the vote it was resolved that **1st Respondent secures an appointment with His Majesty to inform him of the outcome and he asked that he be accompanied by 3rd Respondent.**

[15] It is worth noting that Prince Tfohlongwane voted with those who voted for the deceased to be buried at Mkhwakhweni and now contradicts himself in his answering affidavit.

[16] Mr. Samuel Mkhombe the first witness for the Respondents in his evidence in chief confirmed that the majority agreed that the deceased should be buried at Mkhwakhweni. He added that they had agreed that he be buried as an ordinary citizen and not as a chief. Mr. Mkhombe also confirmed that the 1st Respondent was then assigned with securing an appointment with His Majesty in order to advise him of this decision.

[17] Prince Khuzulwandle, Prince Mfanasibili and Fonono Dvuba in their respective affidavits confirm that the three committees voted that the deceased should be

buried at Mkhwakhweni area and that the 1st Respondent was assigned to secure an appointment with His Majesty to communicate the said decision.

[18] In his evidence in chief Mr. Samuel Mkhombe disclosed that the matter was eventually reported to His Majesty. They went to His Majesty to give a report on another matter involving the Ntshangase family. After making a report they then took advantage of the opportunity of being in His Majesty's presence and reported about the issue of the burial. His Majesty very firmly responded that he had previously commanded that the deceased be buried at Mpuluzi.

[19] My difficulty in accepting this last portion of Mr. Mkhombe's evidence is that nobody else corroborates him and consequently I do not accept his uncorroborated evidence. The only people that could have corroborated this evidence would have been the 1st and 3rd Respondents but they did not give oral evidence for some reasons best known to them.

[20] The 1st Respondent has deposed as follows at paragraph 5 of his answering affidavit:

5.1 ***I deny that the late Muzikayise Ntshangase was a resident of Emkhwakhweni area and I put Applicant to the strict proof thereof.***

5.2 ***So far as I am aware the late Muzikayise Ntshangase was a resident of Mpuluzi area under Chief Nhloko Zwane by virtue of an order of His Majesty King Mswati III.***

[21] The 1st Respondent has not stated how the deceased became a subject of the late Chief Nhloko Zwane. He has not given oral evidence in order to amplify the evidence deposed to in his affidavit. There was no evidence led from the Chief's kraal of the late Zwane in this respect. The 1st Respondent's evidence is hearsay evidence and lacks corroboration and must be rejected. There is an attempt to corroborate this evidence and is found in Prince Gabheni's answering affidavit at paragraph 6 which states as follows:

“The late Mzikayise Ntshangase was subsequently directed to take residence at Mpuluzi under Chief Nhloko Zwane and to my knowledge he is the lawful resident of that area”.

[22] Prince Gabheni does not state how he came about this information. However, when he gave evidence he disclosed that he did not know the information first hand, he had merely heard rumours. Consequently the

evidence is hearsay and is inadmissible.

[23] The second witness that gave evidence on behalf of the Respondents was Titus Msibi a former Commissioner of Police. His evidence was that during the early 1980's while he was still Commissioner of Police he received an eviction letter from Prince Gabheni who was then Minister for Interior. This eviction letter was to be executed against the deceased. He was to be evicted from Mkhwakhweni. It was written by and signed by Prince Gabheni. The letter informed him to go and evict the deceased.

[24] The witness gave the letter to his subordinates at Nhlanguano who carried out the instruction therein. His subordinates gave him a report thereafter that they had taken the deceased to one of two border gates in the south, Lavumisa Border gate or Nsalitshe Border gate. The deceased was able to leave on foot through one of these gates into South Africa. When asked if the deceased left with his family and belongings he answered in the negative. The deceased had said he would return for these in due course.

[25] The witness revealed that the letter embodying the

instruction was a first of its kind. It was different from the eviction orders which he normally received from His Majesty King Sobhuza II. First of all it was an ordinary letter written by Prince Gabheni on official stationery. It was also signed by Prince Gabheni. It did not disclose a destination to where the deceased was to be taken to start his new home after eviction from Mkhwakhweni. This witness gave an example that when King Sobhuza evicted Chief Maziya from Siteki area he had previously prepared a place for him in Shiselweni at Mashobeni south under a new chief. The eviction instruction against the deceased did not disclose his final destination.

[26] Mr. Msibi could not produce this letter because he had left it in the Government offices when he left office. He had requested it from the current Commissioner but it could not be found.

[27] On the 17th July 2007 the Court conducted an inspection

in loco at Mbabane Burial Society. This was to enable the court to see the remains of the late Muzikayise Ntshangase who has been in the mortuary therein since December 2002.

[28] The deceased was found to be in the cold room of the mortuary on a steel shelf covered with a cloth.

[29] When the cloth covering the deceased was removed it revealed the remains of the deceased dressed in a brown suit. The suit was oversized because it looked too big for the deceased. The mortuary owner Miss Dudu Dlamini explained that the body of the deceased had shrunk considerably and the waist size of the trousers was now double. The face and hands were exposed. The face had turned pitch black with only holes in the eye sockets. The flesh had dried up into the bones.

There was a white dust like substance on some areas of the face and the mortuary owner explained that this was in an effort to preserve those portions of the face that were disintegrating.

[30] The hands were claw like and the flesh thereon had dried completely and was stuck to the bones.

[31] It was a sad experience for me as I recalled that Mzikayise Ntshangase was also made in the image of God and my faith was sorely tested as I beheld the horror of his corpse.

[32] The third witness that gave evidence for the

Respondents was Jimson Sithela Shabalala. He is an Indvuna at Mgazini in the Mkhwakhweni area. Most of his evidence was hearsay and therefore inadmissible. Nothing much turns on the evidence which was admissible and does not take the Respondents case anywhere.

[33] On the 23rd July, 2007 I conducted an inspection in loco at Mkhwakhweni of the deceased's home. The Court was received by the representative of the

Regional Administrator Shiselweni District Mr. Edward Mhlanga and a representative of the Royal Swaziland Police, the Regional Commander Mr. Khumalo.

[34] The deceased owns a large homestead with a total of 8 houses. There was in addition 3 modern brickhouses which were in various degrees of construction and had not been completed. The Court was also shown two cattle byres. Below the homestead are a large expanse of fields which extend down to the Mantambe River. It was obvious these fields had not been cultivated for some time.

[35] In one of the huts the court was shown two widows of

the deceased. The Court was advised that they had stayed in the hut since the deceased died in December 2002. They could not venture outdoor nor plough the fields because Swazi custom decreed that they stayed indoors until the deceased had been buried. They complained of extreme hunger.

[36] The Court was next shown the grave of the deceased's grandfather Ntsabakayikhonjwa Ntshangase. It was about 100 metres up a hill and a distance away from the houses.

[37] The Court was next shown the grave of the deceased father Mtfonga Ntshangase. This grave was about 50 metres away from the home. There were many other graves of varying sizes near this grave. It was difficult for the Court to count them as they were covered with grass.

[38] The fourth and last witness for the Respondents was Prince Gabheni. He informed the court that during the early 1980's he was Minister for Interior. During this time King Sobhuza requested him to execute eviction orders. King Sobhuza informed him that his eviction orders caused sorrow to the people who were evicted

and that he was tired of their tears. The late King then suggested to this witness that he would give the Prince signed eviction orders whereupon the Prince would then re-write his own removal letter instructing the relevant stakeholders to evict the said subject. The Prince informed the court that King Sobhuza instructed him as an ordinary citizen and not as a Minister nor as one born of the royal household. He informed the court that he conducted many eviction orders in this fashion.

[39] He informed the court that in the deceased's case he wrote the removal letter which contained instructions to evict the deceased. He had handed a copy of this letter to the Commissioner of Police, Mr. Titus Msibi to execute. He also sent a copy to the District Commissioner for the Shiselweni district at Nhlanguano. This he did because the deceased fell under the jurisdiction of the Shiselweni District Commissioner.

[40] It was Prince Gabheni's evidence that the royal command like all previous commands did not state where the deceased should be taken to after eviction. In this instance the witness was subsequently told that the deceased was taken to Kwazulu.

[41] When asked if this order carried the force of law he informed the court that he seemed to recall that His Majesty had cited the Swazi Administration Order of 1950.

[42] When asked in cross-examination whether Mr. Titus Msibi had lied in his evidence when he had said that all eviction orders executed by him had a destination to which an evictee had to be taken. Prince Gabheni responded that he could not remember any order which stated where evictees were to be taken. A very telling response indeed for a minister then and a minister now. The Prince ultimately reluctantly responded that Mr. Msibi was not telling the truth.

[43] Prince Gabheni was unable to produce the orders he gave evidence on at this stage. He informed the Court that he had left them in the Government office safe when he left office but these orders could no longer be found. The Prince's evidence supports that of his affidavit as he left office over 20 years ago at the relevant time.

[44] It was also put to the Prince that when this matter came

before His Majesty King Mswati III's advisory committees the then Attorney General, Mr. Phesheya Dlamini found the Government file from the Ministry of Interior/Home Affairs with all copies of past eviction orders issued by His Majesty King Sobhuza II but was unable to find the eviction orders in respect of the deceased. The Prince's response was that he was not surprised due to the corruption that had beset the country. He had however left everything intact when he had left office.

[45] It was put to the Prince that even Mr. Titus Msibi and his successors did not have a copy of the eviction order. His response was that he was surprised as he wondered why this was the only order missing from Government files.

[46] The Respondents closed their case after this witness had given evidence. Mr. Mabila for the Applicants thereafter applied for absolution from the instance. He based his application on the fact that the Respondents had failed to produce a copy of the alleged eviction order nor to give an explanation as to why they could not produce the said order. Hence they had failed to discharge the evidentiary burden placed

them.

[47] Mr. Magagula for the Respondents opposed this application. He submitted that Prince Gabheni the author of the removal order had testified that he had issued the order and was corroborated by Mr. Titus Msibi who had seen the order and had executed it. There is substance in this submission.

[48] Before I could hand down my ruling on the matter I had indicated that I would wish to conduct an inspection in loco at Mpuluzi. Before the inspection was carried out Mr. Magagula for the Respondents filed an urgent application under a certificate of urgency for the re-opening of the case. This was to allow Prince Gabheni to hand in copies of the eviction orders issued by him on the 31th July 1982 and that of King Sobhuza II dated 20th July 1982. These had been since found.

[49] Mr. Mabila for the Applicants filed a notice to oppose the said application together with a notice to raise points of law thereto. The application was set down for the 31st July 2007 and I duly heard representations thereon but before the end of the hearing Mr. Mabila

indicated that he was no longer opposing that the removal orders be handed in. Consequently the eviction orders were handed in by consent Respondents' Counsel insisting that it be placed on record that Prince Gabheni had stated that the document dated 20th July 1982 was received by him from King Sobhuza II. The document referred to is annexed to another document Annexure "AG1". For convenience I shall refer to it as Annexure "AG2".

[50] "AG2" is a photocopy dated 20th July 1982 and is entitled "Removal Order" and states:

"In exercise of the powers conferred upon me by virtue of Swazi Law and Custom and by Section 20 of the Swazi Administration Act, 1950, I SOBHUZA II Ngwenyama of Swaziland, hereby authorise Prince Gabheni, Minister of Home Affairs to sign a removal order of the under mentioned person: under the said Act:

***Mzikayise Ntshangase - Chief Salebona
of Mkhwakhweni Area.***

SOBHUZA II

I NGWENYAMA OF SWAZILAND"

"AG1" is also a photocopy dated 30th July 1982. It is also entitled

“Removal Order” and states:

“In exercise of the rights and powers in me vested by King, Sobhuza II, Ngwenyama of Swaziland under the Swazi Laws and Customs, and by Section 20 of the Swazi Administration Act, 1950. MZIKAYISE NTSHANGASE of Chief SALEBONA is hereby ordered to leave MKHWAKHWENI AREA together with his dependants, on or before the 31st August, 1982.

(PRINCE GABHENI)

MINISTER FOR HOME AFFAIRS

cc. Permanent Secretary, Ministry of Home Affairs, Commissioner of Police, Officer Incharge, Shiselweni District. District Commissioner, Shiselweni.”

The signature above the words Sobhuza II is illegible.

[51] On the 6th August 2007 I duly carried out an inspection in loco at Mpuluzi. The Court arrived at the Umphakatsi where it was met by the representatives of the Regional Administrators office, Manzini District, a

Mr. Khumalo and the representative of the Royal Swaziland Police Regional Commander, Mr. Maphosa and members of Umphakatsi of the area. Chief Nhloko Zwane passed away some years ago and has not yet been replace.

[52] From the Umphakatsi Kraal the Court and the additional entourage was taken to an area some distance away from to a rock approximately 12 x 6 metres where it was alleged the deceased had been dumped when he was taken to Mpuluzi. The Court was also shown a homestead which had a run down shelter not far off this rock and this is where the deceased was housed temporarily in sympathy to his plight. The Court was advised that this homestead had initially belonged to a Maseko family who at the time of the arrival of the deceased had abandoned it. After the deceased left it had been allocated to a Vilakati family. Indeed it showed signs of occupation as near the run down shelter there appeared to be a newly constructed room which still had not been plastered and some motor vehicles in the yard.

[53] The members of Umphakatsi as well as the residents of the area were very vocal and adamant that the deceased was never a resident of the area. They did not know him. He was not received formally by Umphakatsi as is the norm. He did not have an emissary to assist him to khonta. They

did not wish him to be buried at Mpuluzi. They also divulged to the Court that there was no community cemetery at Mpuluzi. Deceased persons were buried within the precincts of their individual homesteads.

[54] In its judgment in Case No. 1/2007 in the matter between Lindimpi Wilson Ntshangase and three others v Prince Tfohlongwane and two others (unreported) the Appellants had sought a review of a High Court decision. The Supreme Court found for the Applicants and ordered that the matter be remitted back to the High Court for oral evidence to be heard. In the same judgment the Supreme Court gave guidelines for the Court hearing the matter and defined the issues to be tried. There are 4 guidelines and these appear on page 21 - 22 of the aforementioned judgment at paragraph 9.2. These are stated as follows:

“1. Was any lawful and enforceable eviction order issued by any recognised authority in terms of which the deceased was evicted from the Mkhwakhweni area?

2.If such order was issued in terms of which the deceased was to be evicted, was it still valid and enforceable at the time of his

death?

3. In the event of Court finding that such an order was issued and enforceable as aforesaid, did the existence thereof vitiate the right of the appellants to bury the deceased in the Mkhwakhweni area?

4. Generally, and in view of the subject matter of the dispute and the substantial lapse of time since the death of the deceased, whether the public interest does not require the Court to make such order concerning the burial of the deceased as it deems fit and proper?

[55] I have described the documents handed in above. “AG1” was crafted and issued by Prince Gabheni even though it is a photocopy and not the original. I have no doubt that he is the author thereof and because of that fact it passes the admissibility test. The question that remains to be answered is whether it was (is) lawful and consequently enforceable. I shall return to this later.

[56] “AG2” on the other hand purports to be an order

emanating from the late King Sobhuza II. A party relying upon statements in a document must ordinarily comply with three requirements namely:

- Production of the original. This is traditionally regarded as one of the most important surviving remnants of the best evidence rule.
- Proof of authenticity – a party who tenders a document is ordinarily required to give evidence to satisfy the Court of its authenticity. This will usually mean proving that the document was written or executed by the person who purports to have done so. One could do this in a number of ways of which the most common would be to call the writer to identify the document which in this case is an impossible feat. The respondents could have tendered the evidence of someone who saw the author thereof sign or write it or who can identify his handwriting. (The South African Law of Evidence – 4th ed- Hoffman and Zeffert). “AG2” is typewritten. The Respondents did not call the typist nor did anyone
- testify that they saw the author sign it nor did anyone testify that the signature thereon is that of King

Sobhuza II. In any event it is so illegible that it is virtually impossible to identify.

- The third requirement, that of complying with the Stamp Duties Act No. 37 of 1970 has not been complied with. “AG2” clearly fails the test of admissibility and must therefore be rejected.

[57] Having rejected Annexure AG2 what then is the status of the removal order issued by Prince Gabheni. Prince Gabheni cited Section 20 of the Swazi Administration Act 1950 as being one source of authority for the removal orders. Section 20 provides as follows:

“20. Any Swazi who contravenes or fails to comply with any provision of this Act or any regulation or rule made thereunder in respect of which no special penalty is provided shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding one year or both”

“Section 4 (b) (3) (as amended) provides as follows:

“The Ngwenyama in Libandla may at any time make an order, containing

such conditions as he may consider appropriate for the removal of any person or any of his dependants living with him **from one Swazi area to another Swazi area.**

[58] It is obvious that the section cited in the removal orders is wrong. This error alone invalidates both removal orders.

[59] Prince Gabheni also cited a royal command as the other basis of his authority to issue the removal order. In his evidence in chief he informed this court that His Majesty King Sobhuza II advised the Prince that he was tired of the sorrow of his people which were caused by removal orders emanating from him. The late King requested Prince Gabheni to issue removal orders on the Kings behalf not as one born of the royal household nor as a Minister of Interior but as an ordinary citizen. If this is true then "AG1" has no legal basis because all removal orders must find basis in section 4 (b) (3) cited above, and must state the final destination of the evictee.

[60] A further contradiction is apparent in the evidence of Titus Msibi former Commissioner of Police and Prince Gabheni's evidence. Mr. Msibi informed this Court that all removal orders that the police executed normally

included the place where an evictee was to be taken. Mr. Msibi's evidence is in consonant with the provisions of the Act cited above. He further told this Court that the removal order in respect of the deceased did not specify the place to which the deceased would be taken. When this anomaly was put to the Prince his response was that there was no need to state the place to which the deceased would be removed to as it was well known that the deceased's origins were in the Republic of South Africa. But this cannot be true as the deceased was a Swazi citizen, a fact well known to the Prince and the then Commissioner of Police. In fact this would probably explain the lack of zeal in the deceased's removal by the Msibi's subordinates. Mr. Msibi informed the Court that only the deceased was removed and placed at one of the southern borders. His family and possessions were not removed nor were his houses destroyed.

[61] Annexure "AG1" is dated the 20th July 1982. Annexure "AG2" is dated 31st July 1982. His Majesty King Sobhuza II passed away on the 20th August 1982. It is very difficult for a Swazi such as myself who was a major adult at the time and who mourned the passing

of the King to conceive of His Majesty King Sobhuza II dealing with this issue at a time when he was reported to be very ill. No wonder the signature on Annexure "AG2" is invisible.

[62] I cannot therefore accept the contents of Annexure "AG1" for the foregoing reasons and must henceforth reject same. Having earlier rejected "AG2", "AG1" also falls away. In the circumstances I hold that there was no lawful and enforceable eviction order issued by any recognised authority in terms of which the deceased was evicted from Mkhwakhweni area. In the event, it is not necessary for me to respond to 2 and 3 of the Supreme Courts guidelines.

[63] I indicated earlier that I conducted an inspection in loco of the deceased at the morgue. This terrible act of cruelty that has left him lying in the morgue all these years must now come to an end. His non-burial is an indictment on all of us fellow Swazis and is extremely embarrassing to the country both internally and internationally.

[64] Having also conducted an inspection in loco of the deceased home at Mkhwakhweni I discovered that he

has an illustrious history which his family and every Swazi should be proud of. It is not surprising that his family should want him buried with his ancestors and forbears. The Ntshangase's are a huge clan in their own right and occupy a large area of the south of Swaziland and beyond the Swazi borders into South Africa. The deceased grandfather and father are buried within the precincts of the Ntshangase homestead. It therefore makes sense that the deceased should take his place besides his departed ones.

[65] In our traditional religion we revere and honour our ancestors. We perform rituals called **kuphahla** in their honour and this fact cannot be ignored because we are now Christian. It would be awkward for the Ntshangase's to perform these rituals anywhere else other than at Mkhwakhweni in the exclusive privacy and company of their departed ones.

[66] The Respondents had offered to bury the deceased at Government expense at Mpuluzi but Mpuluzi is no longer an option.

The Respondents excluding Prince Khuzulwandle are

the reason that the deceased has lain in the morgue all these years. The three committees as evidenced by the 1st Applicants replying affidavit which is supported by Mr. Mkhombe's oral evidence had recommended that the deceased be buried at Mkhwakhweni. I have no doubt that His Majesty the King would have accepted and acted on this advice had the long awaited appointment been made by Prince Tfohlongwane. I have set out above the list of those that voted in favour of the deceased being buried at Mkhwakhweni because it includes prominent senior princes and members of the royal household. I see no reason to differ from them and endorse their decision myself.

[67] The body of the deceased has been at the morgue since December 2002 due to Prince Tfohlongwane's failure to secure an appointment with His Majesty in order to report the decision of the three committees.

[68] When the Applicants approached the High Court for assistance, the 1st and 3rd Respondents opposed the application further lengthening the deceased's stay at the morgue.

[69] The King's private secretary Mr. Mkhombe, the

Governor of Ludzidzini Mr. Jim Gama and the Chairman of the Swazi National Standing Committee Prince Tfohlongwane are high ranking officials in the King's Court. They were

unable to give His Majesty correct advice as to the real situation that prevailed at Mpuluzi. They failed to go and find out if what they were proposing viz that deceased be buried there was feasible or not. As it turned out burying the deceased at Mpuluzi is out of the question.

[70] Had His Majesty acted on their advice his command would have been met with defiance and resentment from the people of Mpuluzi to the Kings utter embarrassment. It is just as well that it was only the Court that was embarrassed. The Court believed Counsel for the 1st and 3rd Respondents. It had no reason to disbelieve Mr. Magagula as he is a senior member of this Court. As it turns out he was also misled by his clients.

[71] To further the aforesaid Respondents nefarious deeds the Government was even prepared to use taxpayers

money to bury the deceased at Mpuluzi in order to please them. This therefore is an ideal case to award costs on a punitive scale.

[72] In the circumstances I hold as follows:

- (a) The application for absolution from the instance is hereby granted.
- (b) The deceased Mzikayise Ntshangase is to be buried at Mkhwakhweni. May his soul finally find peace and his family closure to this painful episode in their lives.
- (c) The Respondents are hereby ordered to pay the costs hereof. The costs are to be paid on an attorney client scale. The costs order excludes the 2nd Respondent, Prince Khuzulwandle.
- (d) The Royal Swaziland Police are hereby ordered to provide security herein whenever it is required until the deceased has been buried.

Q.M. MABUZA -J

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